

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORMAN R. KNIGHT, III and DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD, Charleston, S.C.

*Docket No. 96-1651; Submitted on the Record;
Issued June 10, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met his burden of proof in establishing a lung condition causally related to factors of his federal employment; (2) whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for reconsideration of the merits of his claim pursuant to section 8128(a) of the Federal Employees' Compensation Act constitutes an abuse of discretion; and (3) whether the Office properly denied appellant's request for a hearing pursuant to section 8124(b) of the Act.

On October 16, 1993 appellant, then a 40-year-old former pipefitter, filed an occupational disease claim, alleging that he had a lung condition of which he first became aware in March 1993 related to asbestos exposure while in the performance of duty. Appellant was removed from his position on April 10, 1987. On June 17, 1994, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that fact of injury had not been established. On October 17, 1994 this decision was reissued. In a decision dated July 7, 1995, an Office hearing representative vacated the Office's prior decision and remanded the case for resolution of a conflict in the medical evidence. In a decision dated November 3, 1995, the Office again denied the claim on the grounds that appellant failed to establish that the claimed condition was causally related to factors of his federal employment. On January 3, 1996, the Office denied merit review of appellant's claim on the grounds that the evidence submitted with his request for reconsideration was irrelevant and immaterial. In a decision dated March 25, 1996, the Office denied appellant request for a hearing on the grounds that reconsideration was previously requested and a decision issued pursuant to section 8128 of the Act and that reconsideration could again be requested with the submission of relevant evidence.

The Board has carefully reviewed the entire case record on appeal and finds that appellant has not established that he sustained a lung condition causally related to factors of his federal employment.

An award of compensation may not be based on surmise, conjecture, speculation, or appellant's belief of causal relationship.¹ The Board has held that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference of causal relationship between the condition and the employment.² Neither the fact that the condition became apparent during a period of employment nor appellant's belief that employment caused or aggravated his condition is sufficient to establish causal relationship.³ While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty,⁴ neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.⁵

In the present case, an Office hearing representative vacated the Office's original decision and remanded the case in order for the Office to resolve the conflict in the medical opinion evidence. Dr. Cary E. Fechter, a Board-certified internist specializing in pulmonary medicine and appellant's treating physician, diagnosed asbestosis of mild severity based predominantly on the results of pulmonary function tests and abnormal radiographic changes, including pleural thickening consistent with asbestosis. In contrast, Dr. William R. Cook, a Board-certified internist specializing in pulmonary medicine and Office referral physician, diagnosed restrictive airway disease secondary to obesity and subpleural fat accumulation. He noted that appellant's exposure to asbestos was during the 1980's over a six year period when the work environment would have been relatively asbestos-free and that the disease presentation was insufficient as it was less than 15 years. Dr. Cook found subpleural epicardial and mediastinal fat by computerized tomography (CT) scan but no evidence of pleural thickening. On remand, the Office referred appellant to Dr. Wayne C. Vial, a Board-certified internist specializing in pulmonary medicine, for an impartial medical examination and opinion on the matter.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of the resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶ The Board has carefully reviewed the opinion of Dr. Vial and finds that it has sufficient probative value, regarding the relevant issue in the present case, to be accorded such special weight.

¹ *Williams Nimitz, Jr.*, 30 ECAB 567, 570 (1979); *Miriam L. Jackson Gholikely*, 5 ECAB 537, 538-39 (1953).

² *Edward E. Olson*, 35 ECAB 1099, 1103 (1984).

³ *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

⁴ *See Kenneth J. Deerman*, 34 ECAB 641 (1983).

⁵ *See Margaret A. Donnelly*, 15 ECAB 40 (1963); *Morris Scanlon*, 11 ECAB 384 (1960).

⁶ *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

In his report, Dr. Vial reported the results of his examination of appellant from August 18 to September 5, 1995. In the March 16, 1994 CT scan, he noted no parenchyma fibrosis but did find extensive mediastinal and epicardial as well as bilateral subpleural fat depositions. Dr. Vial diagnosed a pulmonary illness compatible with some element of reactive airway disease or asthma, but found no interstitial lung disease, pleural thickening or pleural calcification. He indicated that there was no evidence of asbestos related lung disease as the lung parenchyma appeared normal and appellant had no rales on physical examination. Dr. Vial also did not believe appellant had asbestos related thickening and concluded that appellant's subpleural fat deposits were not work-related. As Dr. Vial provided a well-reasoned and rationalized medical opinion that definitively concluded that appellant's lung condition was not related to factors of his federal employment, this report was entitled to special weight. Consequently, the Office properly found that appellant had not established that his claimed lung condition was causally related to factors of his federal employment.

The Board also finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under section 8128.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.⁷ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁸ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁹

In the present case, appellant submitted a request for reconsideration in which he alleged that the Office hearing representative's remand instructions had not been followed by the Office, asserting that Dr. Vial did not resolve the conflict in the medical evidence. As discussed *infra*, Dr. Vial provided a rationalized medical opinion in which he concluded that appellant's lung condition was not work-related. Thus, appellant's argument on reconsideration is without merit. As appellant did not otherwise provide any evidence to support his argument or advance any other legal argument, he did not provide sufficient evidentiary or legal basis for reopening his claim and the Office properly employed its discretion in refusing to reopen the case for further review on the merits.¹⁰ Therefore, the Board finds no evidence of an abuse of discretion in this case record.

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

⁹ *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁰ *See John F. Critz*, 44 ECAB 788 (1993); *Jimmy O. Gilmore*, 37 ECAB 257 (1985).

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides: "Before review under section 8128 of this title, a claimant for compensation not satisfied with the decision of the Secretary... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹¹ Thus, appellant must request a hearing within the provided time limitation before he requests reconsideration or he is not entitled to a hearing as a matter of right.¹² In this case, appellant requested and a decision was issued in relation to his request for reconsideration prior to his filing a request for a hearing. Therefore, appellant is not entitled to hearing as a matter of right.

Even when appellant is not entitled to a hearing as a matter of right, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved, and the hearing was denied on the basis that he could address this issue by submitting evidence which established limited review, *i.e.*, demonstrated that his lung condition was causally related to factors of his federal employment. Appellant was advised that he may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹³ There is no evidence of an abuse of discretion in the denial of a hearing in this case.

The decisions of the Office of Workers' Compensation Programs dated March 25 and January 3, 1996 and November 3, 1995 are hereby affirmed.

¹¹ 5 U.S.C. § 8124(b)(1).

¹² *Se Mary G. Allen*, 40 ECAB 190 (1988).

¹³ *Daniel J. Perea*, 42 ECAB 214 (1990).

Dated, Washington, D.C.
June 10, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member